

October 10, 2005    The nomination of White House lawyer Harriet Miers to the Supreme Court has raised questions about her qualifications and political ideology. Conservatives and liberals alike fear that Ms. Miers will not represent their views, and will rule on issues in ways that harm our nation. But clearly we are not asking the right questions about Supreme Court nominees. The issue is not how candidates intend to wield judicial power, but rather whether they understand that the Constitution imposes limits on that power in the first place. We are guilty of permitting our federal courts to become politicized, when the proper role of those courts is to protect us from the very abuses that arise from politics. Instead of viewing federal judicial nominees as liberals or conservatives, we ought to be viewing them as activists or originalists. Judicial activism is a popular and often misused term in politics today, but if we define it properly we can better understand the problem with our courts. Judicial activism is the practice of judges legislating from the bench, by interpreting law in a manner that creates an outcome to fit their political views. But judicial activism is more than this. Activist federal judges not only craft laws, they also ignore the laws in place-- particularly the enumerated powers listed in Article I of the Constitution and underscored by the 9th and 10th amendments. By ignoring the strict constitutional limits placed on the federal government and bulldozing states' rights, federal judges opened the door to the growth of wildly extra-constitutional government in the 20th century. Activist courts enable activist government. The bitterness and controversy that often surround the nomination of Supreme Court justices in recent decades makes perfect sense when we consider the lawmaking and lawbreaking power that activist federal courts possess. Federal courts in general, and the Supreme Court in particular, have long since ceased serving as referees who guard against government overreaching. Instead they have become unelected, unaccountable purveyors of social policy for the entire nation. Bitter partisan fights over Supreme Court nominees are inevitable simply because so much is at stake. How did this come to pass? Unfortunately, our nation has embraced the flawed notion that only scholars, judges, or attorneys are qualified to understand and interpret the Constitution. We have come to accept that constitutional law must be revealed to us from on high by our black-robed masters. Yet nothing could be further from the ideal of constitutional jurisprudence envisioned by our founders. The Constitution is written in plain, forthright text, and there is nothing mystical about it. It simply establishes a system of shared, limited power between the three branches of the federal government, while reserving most government power to the states themselves. It seems that schoolchildren once knew far more about the Constitution than many adults do today. Yet we cannot hold intelligent opinions about Supreme Court nominees unless we understand this basic constitutional framework. It is therefore incumbent upon every American to read the text of the Constitution, study the history of its drafting and ratification, and consider whether federal judicial nominees will properly abide by their originally intended roles. The Constitution above all is a document that limits the power of the federal government. The fundamental point that has been lost in our national discourse is this: the Constitution prohibits the federal government, including the federal judiciary, from doing all kind of things. Until we have federal judges who understand this, it matters little what political stripes or experience they bring to the bench. The Constitution does not empower government and grant rights, it restricts government in order to safeguard preexisting rights. When federal courts disregard this principle, acting as legislatures or failing to enforce constitutional limitations, we get the worst kind of unaccountable government.